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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**JEANNIE W. BOERDAM,**

**Petitioner,**

**vs.**

**GENPAK and UTAH GUARANTY FUND  
for RELIANCE NATIONAL INDEMNITY  
COMPANY,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

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**ORDER OF REMAND**

**Case No. 02-0716**

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Genpak and Utah Guaranty Fund for Reliance National Indemnity Company (referred to hereafter as "Genpak") ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Hann's award of benefits to Jeannie W. Boerdam under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

Ms. Boerdam claims permanent total disability benefits from Genpak for work injuries she incurred to her back on November 17, 1999, and her right foot on December 14, 1999. Judge George held an evidentiary hearing and then referred the medical aspects of the case to a medical panel, along with his interim findings of fact. Prior to issuing a final order, Judge George retired and Judge Hann was appointed to this case. After reviewing the evidentiary record, Judge Hann issued a preliminary order for permanent total disability benefits.

In its motion for review, Genpak argues that Judge Hann's order for benefits should be reversed because (1) there was work reasonably available, which would preclude a preliminary order for permanent total disability benefits, and (2) Judge Hann failed to give deference to Judge George's interim findings of fact regarding Ms. Boerdam's credibility.

**FINDINGS OF FACT**

The Appeals Board adopts Judge Hann's findings of facts to the extent they are consistent with this decision. The facts relevant to the motion for review, including supplementation from the hearing record, are as follows:

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In 1997, Ms. Boerdam began working for Genpak as a packer in its assembly line. On November 17, 1999, she tried to stop a stack of folded cardboard boxes from falling and, as she reached forward and twisted, she felt a snap in her back and right hip area with immediate onset of pain. She was diagnosed with internal disc disruption and had a discectomy and fusion surgery for her back on September 16, 2000. Also, on December 14, 1999, Ms. Boerdam was at work when her right hip went out and caused her to slip on some ice, twisting her right foot. She underwent tarsal tunnel release on her right foot on March 16, 2001.

As a result of the back condition, Ms. Boerdam was issued permanent restrictions as follows: changing positions as needed; no sitting longer than one hour or standing for more than 30 minutes without being allowed to change positions; no repetitive lifting over 20 pounds; no pushing, pulling or carrying over 20 pounds; and no repetitive bending, stooping, or twisting. Ms. Boerdam's physician assigned a 15% whole person impairment for Ms. Boerdam's lower back and a 7% whole person impairment for her right foot. Genpak's medical consultant, Dr. Knoebel, assigned an 18% whole person impairment for the lower back and a 1% lower extremity impairment for the right foot. Mr. Dell Felix conducted a functional capacity examination wherein he noted that Ms. Boerdam's maximum tolerance for sitting was 32 minutes. Mr. Felix concluded Ms. Boerdam's functional capacity placed her in the sedentary work classification.

On November 17, 1999, the date of the first injury, Ms. Boerdam was 38. She did not complete high school and has had no vocational training. She was a stay-at-home mom until approximately 1995, when she began seasonal work as a cashier/ticket-taker for a ski resort. In May of 1997 she started working for Genpak. At the hearing, Mr. Kenneth Lister, Ms. Boerdam's vocational expert, testified extensively regarding her ability to work. Mr. Lister detailed his understanding of the various work level characteristics (sedentary, light, medium, heavy, and very heavy) according to the Dictionary of Occupational Titles ("DOT"). He testified that according to DOT, to qualify in the sedentary work level, a person must be able to sit for six hours in an eight-hour day. Based on his review of these guidelines and Ms. Boerdam's physical limitations according to the medical records, it was Mr. Lister's opinion that Ms. Boerdam's work level capacity was **less than sedentary** and there were no jobs available for which she would qualify. During cross examination, Mr. Lister conceded that had Ms. Boerdam qualified for sedentary work, her ability to find a job would have been enhanced.

In the determination, Judge Hann found that Ms. Boerdam's work level capacity is sedentary and that Ms. Boerdam is not able to perform other work based on her education, age, work experience, medical capacity and functional capacity.

**DISCUSSION AND CONCLUSIONS OF LAW**

In its motion for review, Genpak argues that there was other work reasonably available to Ms. Boerdam, which precludes a finding for permanent total disability benefits. Genpak bases this contention on Mr. Lister's testimony that Ms. Boerdam's ability to find a job would be enhanced if

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she could work at the sedentary level; thus, by finding that Ms. Boerdam was qualified for sedentary work in her determination, Judge Hann's later finding that no work was reasonably available is arbitrary and not supported by the evidence.

First, the Appeal Board notes that regardless of classifications of "sedentary" or "less than sedentary," the vocational expert's testimony was that there were no jobs available to Ms. Boerdam because of her physical limitations, which he familiarized himself with by reviewing the medical evidence. His opinion was that her limitations qualified her at less than sedentary. Therefore Judge Hann's finding that Ms. Boerdam could work sedentary positions cannot be applied to Mr. Lister's definition and conclusions. Second, the Appeals Board finds that the evidence shows Ms. Boerdam's physical limitations qualified her for less than sedentary work. Thus, the Appeals Board finds that Ms. Boerdam cannot perform other work reasonably available taking into consideration Ms. Boerdam's education, age, work experience, medical capacity, and residual functional capacity.

Genpak's second argument is that Judge Hann erred in not giving deference to Judge George's findings of fact regarding Ms. Boerdam's credibility and that her decision should therefore be reversed. The Appeals Board notes, however, that Judge George's findings of fact were only preliminary and subject to change. But, more importantly, the Appeals Board is the ultimate fact-finder, and after reviewing the evidence, the Appeals Board agrees with Judge Hann's findings.

In summary, the Appeals Board concurs that Judge Hann's findings that there was no work reasonably available to Ms. Boerdam and that she established the elements necessary for entitlement to a preliminary order for permanent total disability benefits.

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**ORDER**

The Appeals Board affirms Judge Hann's preliminary order for permanent total disability benefits. The matter is remanded to Judge Hann to hold further proceedings necessary to resolve this matter.

Dated this 28<sup>th</sup> day of October, 2008.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

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